EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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IMARI ANDREWS, individually and on behalf of all others similarly situated,

Plaintiffs,

20 Civ.04521 (VSB)

v.

RITE AID CORPORATION and RITE AID OF NEW YORK, INC.,

Defendant.

Teleconference

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New York, N.Y.
March 11, 20121
11:00 p.m.

Before:

HON. VERNON S. BRODERICK,

District Judge

APPEARANCES

FITAPELLI & SCHAFFER LLP
Attorney for Plaintiff
BY: BRIAN SCOTT SCHAFFER

LITTLER MENDELSON, P.C.
Attorneys for Defendants
BY: ELI ZEV FREEDBERG
MIGUEL ANGEL LOPEZ

THE COURT: Hi. This is Judge Broderick.

MR. SCHAFFER: Good morning, your Honor.

THE COURT: Good morning.

Before we get started, I just want to confirm that we have all the parties on the line.

Is plaintiff's counsel on the line?

MR. SCHAFFER: Yes, your Honor.

Brian Schaeffer, from Fitapelli & Schaffer.

MR. BENHARRIS: Good morning, your Honor.

Hunter Benharris from Fitapelli & Schaffer as well.

THE COURT: And is defense counsel on the line?

MR. FREEDBERG: Yes, your Honor. This is Eli Freedberg, from Littler Mendelson, for defendants.

Miguel, are you there?

MR. LOPEZ: And Miguel Lopez, also from Littler Mendelson, for defendants.

THE COURT: Okay. Good morning, Ms. Smith. Thank you.

Okay. If we could go on the record. And if I could ask counsel, beginning with counsel for the plaintiff, to introduce themselves for the record. And please remember after you introduce yourself that when do you speak during the pendency of the conference, please identify yourself by name so that we can make sure that we have an accurate record. Also, I would ask that any counsel who is not speaking, I'd ask you to

please try and mute your phone to eliminate background noise so we can make sure Ms. Smith, our court reporter, can hear the folks who are speaking.

Okay. First, plaintiff's counsel?

MR. SCHAFFER: Brian Schaffer of Fitapelli & Schaffer, for plaintiff.

MR. BENHARRIS: Hunter Benharris from Fitapelli & Schaffer, for plaintiff.

THE COURT: For the defense?

MR. FREEDBERG: Eli Freedberg from Littler Mendelson, for defendants.

MR. LOPEZ: And Miguel Lopez of Littler Mendelson, also for defendants.

THE COURT: Okay. All right. Thank you.

So, currently before me is a motion to dismiss. So I have several questions for the parties. And then I will allow either side, if you have anything to add, to add whatever you deem is appropriate. Let me ask first of plaintiff's counsel:

Is there any evidence either before me -- well, first before me -- that shows that following the March 21st, 2020, pay period, that the defendants failed to factor in the bonus into the plaintiff's overtime?

MR. SCHAFFER: This is Brian Schaffer.

What defendant provided was essentially one subsequent pay period that appeared to show that plaintiff was properly

paid overtime. I believe it was the pay period following the initial, where the plaintiff was not properly timely paid the overtime. As for the paystubs or pay period after that, plaintiff doesn't have the paystubs in his possession, and defendant has not attached those paystubs. So I think, from plaintiff's perspective, it's unclear.

THE COURT: Well, let me ask a followup question. In connection with the motion to dismiss, am I correct -- well, did plaintiff submit a declaration or an affidavit stating that for the periods after the March 21st, 2020, pay period, that for those pay periods either that he wasn't compensated -- excuse me, that the defendant failed to factor in the bonus into his overtime?

MR. SCHAFFER: No. Plaintiffs did not submit an affidavit stating such.

THE COURT: Okay. So as I understand it by way of example in the complaint, there was an indication that for the pay period, that March 21st pay period, there was an indication by the calculation that the Hero bonus -- for lack of a better term -- or Hero pay was not calculated as part of the bonus.

Is that an accurate statement with regard to the statements in the complaint?

MR. SCHAFFER: Yes, that is correct, your Honor.

THE COURT: And then as I understand it, defendants submitted the paystub or pay documents for that subsequent pay

period -- am I correct -- that showed for that pay period that that the differential was, in fact, made up in the next pay period?

MR. SCHAFFER: That would be a correct statement.

THE COURT: Okay. All right. Let me ask. With regard to that March pay period and the subsequent pay period that the bonus was made up -- so is the injury that plaintiff is alleging -- and, again, with regard to that specific pay period, is it that plaintiff wasn't promptly paid the overtime payment; in other words, wasn't paid the overtime during the pay period that the overtime was actually worked?

MR. SCHAFFER: Yes, that's correct, your Honor.

The allegation is that under 29CFR778.106 the overtime needs to be paid concurrent with the pay period in which the overtime is worked.

THE COURT: Okay. All right. Let me ask the defendant's counsel a question.

With regard to the Hero Pay bonus and the delay, is there any materials currently before me indicating or demonstrating what caused the delay of that payment?

MR. FREEDBERG: Sorry, your Honor. This is Eli Freedberg. I didn't mean to cut you off.

THE COURT: No. Go ahead. I had completed my question.

MR. FREEDBERG: Yeah. So, we do have a declaration,

the Alcovitz declaration, that does explain the reason for the delay. And the reason was that the Hero Pay bonus was quickly formulated to reward the essential workers who were working during the very beginning of COVID, and that the bonus was implemented mid pay week, and that to get their payroll to essentially process the overtime, it just took time. So they were able to demonstrate easily through whatever system they had that the base pay, the straight-time pay, was paid, but they took essentially longer to program the system to calculate the overtime based on that differential.

THE COURT: Okay.

MR. FREEDBERG: So they were able to expedite -- according to the declaration we submitted, Rite Aid was able to program, and it just took that extra week -- extra few days that carried into that second pay period.

THE COURT: Okay. And so, administrative back office type things that they needed to adjust in order to have that automatically calculated.

First of all, I'll ask, Mr. Freedberg: Are you aware of any other entities or cases that have been brought where this has been an issue? And by "this," I'm specifically referring, not as a general matter, to the delay --

MR. FREEDBERG: Hero Pay?

THE COURT: The Hero Pay, exactly.

MR. FREEDBERG: I am not, your Honor, although it's a

good question obviously. I do expect the Hero Pay differentials to be -- and Mr. Schaffer can probably shed more light on this than I can. But I do expect to see kind of a flood of wage and hour type litigation about Hero Pay, you know, certainly from -- I don't mean to be flippant about it, but, you know, from a defense perspective, it's kind of a no good deed goes unpunished type situation. But, to answer your specific question, I am not aware of any Hero Pay litigation at the moment. There's certainly no decisions on Hero Pay specific issues.

THE COURT: Okay. Yeah, that's what I thought. And without weighing in one way or the other, I would anticipate there will be other formulations or maybe some like this, just simply because there may be entities actually that ended up just not paying it or delayed or whatever it may be.

Let me ask: With regard to the New York Labor Law Section 191 issue, is there any case law that you can point to or that's in your papers that the private right of action issued under that section is an unsettled issue on state law that federal courts should not exercise supplemental jurisdiction over?

MR. FREEDBERG: Eli Freedberg.

So, in our reply, we cited to -- well, in terms of the supplemental jurisdiction question, your Honor, I am not aware of any cases addressing the supplemental jurisdiction question.

I am aware of cases -- and this is not entirely responsive to your Honor's question, so if you want me to stop I will. But the state of *Vega* of whether there is a private right of action is certainly unsettled. And we've cited in our papers a number of cases to that effect. And I'll refer your Honor to the *Kruty v. Max Finkelstein* cases and *Gardner v D&D Electrical Construction Company* cases that are in our papers.

I want to be very clear though that -- and I think your Honor caught on to this. But I do want to emphasize that we are not in this motion arguing the private right of action issue that has been, you know, hotly contested and hotly litigated throughout state courts and federal courts at this time. We're also not arguing in this motion the measure of damages. For example, plaintiffs are seeking liquidated damages for every late payment under Section 198 of the labor law. That's not the issue we're putting forth in this motion. We took what we frankly think is a novel approach -- and this does get to your Honor's question about whether the Court has jurisdiction to hear this burgeoning novel issue, however you want to characterize it. And frankly the attenuation of this claim to an FLSA overtime claim that plaintiff may or may not have standing to assert, I have never seen that argued before, and to my knowledge, that would be a case of first impression for this Court. So that's the answer to your Honor's question. I'm sorry that was a long-winded way of responding.

THE COURT: No. That's fine. So let me ask. And since it's, Mr. Freedberg, defendant's motion, I'll give you the opportunity to expand or emphasize any arguments that you've already made with regard to your motion.

MR. FREEDBERG: Yes. So, I don't know if your Honor -- I don't want to rehash what we've already contained in the papers, but the way I see it, plaintiff is essentially asserting jurisdiction over the state-law claims, which, again, I think really bears emphasizing is 99.999 percent of the potential damages in this case. I don't think that's a mischaracterization. I think Mr. Schaffer would agree with me that the state-law claims immensely outweigh the value of the FLSA claim -- either FLSA overtime claim where they're really complaining about how one week of pay was treated -- that plaintiffs are seeking the Court to exercise jurisdiction over those claims in two ways: First, being CAFA, and second under a supplemental jurisdiction theory. And in my view, plaintiff has essentially conceded that the local controversy exception under CAFA applies here. They don't dispute the primary factors. The only factor they really seem to dispute is whether -- the final factor in the local controversy exception, whether Rite Aid has been subject to a class action in the last three years. And in support of that claim that there has been, and thus local controversy doesn't apply, plaintiff cites three cases, one of which, *Wilson*, is not a class action anyway.

The other two cases that they cite to are California class actions that, to my knowledge, I don't think even name the primary defendant here, which is Rite Aid of New York Incorporated. And those claims are putative class actions. I don't think they've been certified yet. They're putative class actions that do not assert any of the claims or any of the facts that are present here. Those claims are brought under California law. And the factual predicate to those claims, both two remaining claims that plaintiff cite to, are that in California Rite Aid had a policy that before employees leave the store, they have to submit to a security search of their bags and the time spent undergoing that search wasn't compensable and thus plaintiffs weren't paid all the wages that they were entitled to under California law. Those claims do not appear in this action at all, so they're not related in any way to the claim here, which, again, the primary claim is that under New York law, Rite Aid failed to pay alleged manual workers on a weekly basis.

In other words -- I guess in conclusion -- the claims here are completely different to the claims asserted in the California actions that plaintiff cited to, and thus, the exception -- thus, this falls squarely within the local controversy exception. So I think, in my view anyway, it seems pretty clear that CAFA is inapplicable. We fall clearly within the purview of the local controversy exception. And CAFA

cannot serve as a basis for exercising jurisdiction, at least over the state claims that plaintiffs bring.

Now, if we're correct, and CAFA doesn't apply, then the only basis that a federal court could have to exercise jurisdiction over the state claims would be under a supplemental jurisdiction type theory. But, again, that fails for a myriad of reasons, most of which is that supplemental jurisdiction is really appropriate only when the nexus and the factual underpinnings of the state law claims arise out of the same facts and underpinnings that give rise to the federal claims.

Now, here, the federal claim is solely, as we discussed at the beginning of the call: Did Rite Aid properly count the Hero Pay in its overtime calculation for that one week? And, you know, as we believe we set forth in the papers, we did -- Rite Aid did. But even putting that issue aside, that's it. That's their federal claim hook here that gives them federal jurisdiction over the federal claims. The state law claims, other than the state overtime claim, which we would concede there could be supplemental jurisdiction over the New York labor law overtime claim, but the rate of pay notice claim, the wage statement, and most importantly, the weekly pay claim arises completely out of a different set of facts and circumstances that makes supplemental jurisdiction over those claims particularly inappropriate. And that's only buttressed

by the fact that, as I touched on earlier, the state of the manual law claims are -- despite what plaintiffs want to say, it really is influx. This changed -- you know, up until two years ago, there was virtually no -- not virtually, there was no doubt that there was no private right of action. That changed with an intermediate appellate court decision, that this issue has not arisen to the New York state Court of Appeals. That needs to happen in my view. And as a result, I think that counsels the Court to not exercise jurisdiction over the manual worker claims, because these the should go through the New York state court system and work its way up to ultimately the New York state Court of Appeals.

In addition, I would add that -- and it bears noting, the weight -- you put these claims on scales, and the manual worker claim is without -- I think plaintiffs would tell you, it's a hundred-million-dollar claim. Because, really what they're seeking is liquidated damages for ever hourly worker who worked at a Rite Aid location in New York state going back the full six-year statute of limitations claim. That's half of the payroll for six years. I mean, it's truly an enormous claim. And the federal overtime claim, which is based on one week and is a limited amount of time -- and not every Rite Aid employee necessarily worked overtime that week -- it's minuscule, it's microscopic in comparison to the claim. And you weigh those. And the state claims really should be held

and decided in state court. So for those reasons -- I think we expressed this in our papers as well. But for these reasons, we don't think the Court should exercise supplemental jurisdiction either, and at most, keep the federal -- you know, keep the federal overtime claim here where we are. We can certainly adjudicate that. And if we need to litigate whether -- you know, making up the overtime pay and the subsequent pay period is compliant with FLSA, we could do that here. And certainly we'd bootstrap the New York labor law claim here. But there really is no ground for the Court to exercise supplemental jurisdiction over the remaining claims, because, again, they arise out of totally separate factual nexus and circumstances.

The last thing I will say -- and I know I'm going on for a while, and I appreciate the opportunity, your Honor -- is even if the Court does keep the federal overtime claims in federal court, we would ask that under *Bristol Meyers Squibb* decision from the Supreme Court, that the Court strike or dismiss the collective claim seeking a nationwide collective. This is also -- I mean, in my view, this motion presents a bunch of novel questions where there isn't a whole lot of precedent. In our view, the tide seems to be turning and breaking in our favor where *Bristol Meyers Squibb* is being applied to the FLSA collective action context. I would certainly urge the Court to adopt that approach and to be swept

up by that tide, so to speak. The only arguments really against doing that are policy arguments. And I think Judge Moses in her decision really, really attacked that argument well. And I'm just trying to pull out the quote that she had that I think is worth repeating. Just give me a quick second while I take a few minutes to find it.

(Pause)

MR. FREEDBERG: I'm sorry. The case that I'm referring to in Judge Moses' decision is *Pettenato v. Beacon Health Options*, 425 F.Supp. 3d 264, where she dismisses the policy arguments to not apply *Bristol Meyers Squibb*. And the argument goes: Nothing in the FLSA that prohibits nationwide collective actions and, you know, FLSA is supposed to be remedial and to protect employees robustly, and precluding nation wide collective actions would in some ways defeat that. But Judge Moses noted that the Court's obligation to follow the law cannot be overshadowed by even the most compelling policy arguments. And I think Judge Moses is spot on in that. And also, she goes on to note correctly that in her case -- in *Pettenato* -- plaintiff's policy concerns are somewhat overstated. And she writes:

"Applying *Bristol Meyers* to FLSA collective action will not prevent a nationwide FLSA collective of plaintiffs from joining together in a consolidated action in a state that has general jurisdiction over Beacon Health."

So what judge Moses means there is if plaintiff sued Rite Aid Corporation in the state in which either its headquartered or incorporated in -- which here, it's Delaware and Pennsylvania -- there, they could seek nationwide collective action. Rite Aid Corporation is not domiciled or incorporated in New York, so for that reason, *Bristol Meyers Squibb* does apply here and it should preclude a nationwide collective.

So with that, I think I conclude. And, again, I thank you for hearing me out, your Honor.

THE COURT: Okay. Thank you.

Mr. Schaffer, do you have any response to what Mr. Freedberg said or is there anything you'd like to add to your papers or emphasize in your papers opposing defendant's motion?

MR. SCHAFFER: Sure. This is Brian Schaffer. And thank you, your Honor, for the opportunity to be heard as well.

I think it's clear that this Court should have jurisdiction certainly under the overtime claim under the FLSA and New York labor law. I understand that defendant quickly implemented this Hero Pay policy; however, it was quite simple in that people were provided two dollars an hour extra and, thus, the overtime rate would be literally one dollar if you factor into the regular rate. So I think under 29CFR778.209 there would be no difficulty in computing the overtime pay and, thus, there's no excuse for it to be late, and, thus, it would

be a, you know, valid claim that plaintiffs would bring.

And we cited to many cases where courts have stated that summary judgment is not proper on such a claim because essentially there are issues of fact as to the cause of the improper delay. And a case that, you know, I would point the Court to in response would be *Montero v. JPMorgan*, 2017 WL 1425611, which is in addition to the cases that we cited in our opposition.

In terms of the Court's jurisdiction over the labor law 191 claim, this is a new hot-button issue, as defense counsel has correctly pointed out. But I can say, your Honor, to my knowledge in terms of the cases that are currently being litigated under 191 in the Southern and Eastern district, either there was no underlying FLSA claim or there's CAFA jurisdiction. And as far as I am aware -- and I'm aware of most of these cases -- no court has stated that there's no supplemental jurisdiction over the 191 claim.

To address supplemental jurisdiction first, the *Smith & Wollensky* case states that the state law claim has to rise from the same common nucleus of operative facts. I think here, I mean, the paystub is at issue. And the paystub admittedly was a biweekly paystub. And we attached the paystub to the complaint to show that the overtime wasn't paid properly under the Hero Pay. And we established that. That same paystub could be used to show that hourly manual workers, such as

plaintiff, were not timely paid and that they were not paid seven days after the work was performed.

The only issue that the Court would need to address essentially separate from the frequency of pay are these individual manual workers. And we're talking about individuals that worked in the retail stores as security guards, cashiers, stock people and the like. So I don't think an exorbitant amount of discovery would be needed to find out if they were actually performing manual work more than 25 percent of their time.

As to CAFA, you know, the local controversy, I think -- you know, we point to a case, *Carter v. CIOX* in the Western District. That's 260 F.Supp. 3d 277. And the court there in the Western District in 2017 held that the local controversy did not apply because the class action alleging violations of New York's medical record law is similar to class actions brought against defendants under similar laws of other states in the past three years. Our papers cited to a few California class actions. These are cases that in the three years arose under the California labor code and were for unpaid overtime and improper wage statements. Here, two of the causes of action are improper failure to pay overtime and improper wage statements that's under New York Labor Law 195(3). So I think we can get over the local controversy exemption.

In addition, I just want to point out to the Court

that under CAFA, the defendant has the sole burden of establishing an exemption. And I think certainly, you know, discovery, at minimum, would have to take place regarding those other California state class actions to see if they were, in fact, related enough to defeat the local controversy exemption. And we didn't touch on the home state controversy, but, your Honor, I think our papers sufficiently establish that Rite Aid Corporation is the corporate parent, that all moneys flow through Rite Aid Corporation. Rite Aid Corporation has the same CEO as New York. Plaintiff's paystub, which was allegedly, you know, on behalf of Rite Aid New York lists the Pennsylvania address of Rite Aid on the paystub as well. And I think it's clear that Rite Aid of New York -- I'm sorry, Rite Aid Corporation was a primary defendant. So I think there are three ways to get jurisdiction and I think the Court should certainly exercise that jurisdiction over the 191 claims.

I guess lastly, defendant addressed *Bristol Meyers*. We all know that, you know, district courts go both ways on *Bristol Meyers*. And, you know, as our papers state, we don't believe that *Pettenato* is on the right side of this. And we point to cases from around the country in addition to cases in the Eastern District, the *Lane Bryant* and *Lumber Liquidators* cases, which follow the line of reasoning, which is *Bristol Meyers* was a state claim in state court. Here, we're talking about federal claims in federal court. And those were

individual mass torts, you know, against a drug company. Here, we're talking about unpaid wages. And the Supreme Court recently held the in *Tyson Foods* that in an FLSA or Rule 23 class action, representative discovery is the proper way to adjudicate a class or collective action at a trial level. And defendant cited some cases saying that that's not true and discovery is able to be taken of ever plaintiff in a collective action. That is not true, your Honor. Every collective action I've ever handled -- and it's been many -- either the parties agree or the court orders some sort of representative discovery. It could be, you know, five percent, ten percent of the collective or something like that. I've never seen a case involving hundreds of thousands of opt-ins where the court says every plaintiff must be subject to discovery and every plaintiff must appear for trial. That would be contrary to the policy of 216(b) and Rule 23.

And I think it's also -- you know in terms of policy, defendants saying that the only way that essentially to have jurisdiction over them for a nationwide case is to file in Pennsylvania or Delaware, which is where Rite Aid Corporation is domiciled and their principal place of business, I mean, what defendant is saying, seriously, is that we can file 18 separate class and collective actions in the 18 states which Rite Aid does business, and they wouldn't -- it doesn't make sense, because certainly defendant would want to consolidate

those 18 cases. Here, for judicial economy, we're proposing that all 18 presumably, you know, are controlled by this case and your Honor. And I'd also point out that *Bristol Meyers* I think is very premature. Cases have dismissed the *Bristol Meyers* argument at this motion stage essentially because right now there are no opt-ins from other states. So how could the Court really rule on the jurisdiction issue at this time?

And lastly, I just want to address that defendants we think addressed completely new arguments in their reply under *Spokeo*, regarding concrete injury. We did not request a surreply, but briefly we would just point to a case addressing that. There's a case called *Banta*. It's 2020 WL 1330744 in the Southern District. The court ruled that New York Labor Law unpaid uncling wage claims -- specifically even the 195(3) paystub claim presents a concrete injury. So I think *Spokeo* -- you know, essentially the defendant really tried to throw in the kitchen sink here and really wants you to dismiss this case, and I think plaintiffs have provided plenty reasons why this case should not be dismissed right now. So thank you for your time, your Honor.

THE COURT: Okay. Thank you very much.

What I would propose is the following: I'd like to review my notes and I'd propose, if we could, to pause for about ten or 15 minutes. I will come back and it's my hope that I will be able to provide the parties with my decision

orally. So first let me ask. Does that make sense?

Mr. Schaffer, does that make sense to you?

MR. SCHAFFER: Yes, your Honor. That's fine.

THE COURT: Okay. Mr. Freedberg?

MR. FREEDBERG: Yes. That's fine with me also, your Honor.

THE COURT: Okay. All right. Thank you. So I'm going to step away for -- I'm going to leave my line open, but I'm going to mute you folks. But I'm going to step away for a bit and I'll come back. Let's see, it's 11:39 now. Why don't we say 11:50? Okay?

MR. FREEDBERG: Perfect, your Honor. Thank you.

THE COURT: All right. Thank you.

(Recess)

THE COURT: This is Judge Broderick.

Is plaintiff's counsel on the line?

MR. SCHAFFER: Yes. Brian Schaffer here, your Honor.

THE COURT: Is defense counsel on the line?

MR. FREEDBERG: This is Eli Freedberg. Yes, present.

THE COURT: And do we have the court reporter on the line? Okay. Thank you.

Okay. I'm prepared to issue my decision. Now, having heard the parties, I make the following findings and the following is my decision:

Plaintiff, Imari Andrews, brings a nationwide

collective under the Fair Labor Standards Act, FLSA, on behalf of himself and all others similarly situated hourly workers who have worked for Rite Aid of New York, Inc. and Rite Aid Corporation -- collectively I'll refer to them as "Rite Aid" or "defendants."

Plaintiff alleges that defendants failed to properly compensate him and the FLSA collective for their overtime hours worked. Additionally, plaintiff brings a putative class action pursuant to Federal Rule of Civil Procedure 23, on behalf of himself and all other similarly situated hourly workers in New York, alleging violations of the New York Labor Law. And that's Article 6, Section 190.

I'll refer to this group as "the New York class."Plaintiff alleges that defendant failed to properly pay him under the New York class overtime wages, failed to timely pay wages, in violation of New York Labor Law, Section 191(1)(A); failed to provide proper time of higher wage notices, and failed to supply accurate statements of wages with every payment.

For purposes of deciding defendants' motion to dismiss, I only cite and discuss the specific allegations in plaintiff's complaint that are relevant to my resolution of defendant's motion. Plaintiff, a New York resident, was employed at various Rite Aid stores in New York as an hourly worker from about January 8th, 2020, until May 29th, 2020.

Plaintiff alleges during his employment he frequently worked over 40 hours per week, and in weeks where he did so and earned bonus pay, defendants failed to calculate the overtime rate, including hourly bonus pay, in violation of FLSA. He alleges that, for example, for the pay period March 15th, 2020, to March 21st, 2020, plaintiff worked two hours and 58 minutes of overtime and earned bonus pay, but that overtime he was paid of $25.50 per hour failed to account for the bonus pay he earned. Plaintiff attaches his paystub from that time period as Exhibit A. I will refer to this as "the March 8th to March 21st paystub."

Additionally, plaintiff alleges that because he spent more than 25 percent of his shift performing physical tasks, he should not have been compensated on a biweekly basis, and that defendants' biweekly compensation violated New York Labor Law, Section 191(1)(A). He also alleges that defendants failed to provide him with a proper time of higher wage notice and with accurate wage statements with each payment of wages, as required by New York Labor Law. He alleges that the defendants apply the same employment policies, practices and procedures to all hourly workers in their operation, including policies, practices and procedures with respect to payment of wages, and acted consistent with those policies here.

On August 19th, 2020, this case was referred to mediation. On August 31st, 2020, defendants filed a motion to

dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(2). Because the motion raised jurisdictional issues, mediation was adjourned *sine die*. On October 15th, 2020, plaintiff filed a motion in opposition to defendant's motion to dismiss. On November 5th, 2020, defendants filed a reply in support of their motion to dismiss. Subsequently, both parties have filed supplemental authority and responses to the supplemental authority, filed by the opposing party.

Now, with regard to the legal standard here, a claim may be "properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it." *Makarova vs. United States*, 201 F.3d 110 at 113. In deciding a Rule 12(b)(1) motion to dismiss "the district court must take all uncontroverted facts in the complaint as true and draw all reasonable inferences in favor of the party asserting jurisdiction." I'm citing *Tandon v. Captain's Cove Marina*, 752 F.3d, 239 at 243. Article III of the Constitution circumscribe the Court's authority to hear cases, limiting the jurisdiction of federal courts to cases or controversies. And I'm citing there Article III, Section (2). To meet the minimum constitutional threshold, a plaintiff must establish "first that it is sustained an injury in fact; second, that the injury was in some sense caused by the opponent's action or omission; and finally, that a favorable resolution of the case is likely

to regress the injury." Citing *Cortlandt v. Hellas Telecommunications*, 790 F.3d, 411 at 417.

Now, injury in fact is the first and foremost of these three standing elements. And I'm citing *Spokeo vs. Robins*, 136 Supreme Court 1540 at 1547. To establish this element, "a plaintiff must show that he or she suffered an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical." and I'm citing back there *Spokeo*. To be particularized, an injury "must affect the plaintiff in a personal and individual way." Citing *Spokeo* 1548. To be concrete, an injury must actually exist. Again, citing *Spokeo*, same page. "In resolving a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), a district court may consider evidence outside the pleadings." I'm citing *Parker Madison v. Airbnb*, 283 F.Supp. 3d 174 at 178. Supplemental jurisdiction is governed by Title 28 United States Code, Section 1367. Section 1367 subsection (a) provides "except as provided in subsections (b) and (c), or as expressly provided otherwise by federal statute, in any civil action of which the district courts have original jurisdiction, the district courts have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution."

Under subsection (c), a district court may decline to exercise supplemental jurisdiction over a claim under subsection (a) if, one, the claim raises a novel or complex issue of state law; two, the claim substantially predominates over the claim or claims over which the district court has original jurisdiction; three, the district court has dismissed all claims over which it has original jurisdiction; or four, in exceptional circumstances there are other compelling reasons for declining jurisdiction. And there I'm citing Section 1367(c).

Now, with regard to FLSA standing, defendants assert that plaintiff lacks standing to pursue his FLSA overtime wage claims because the only bonus pay that plaintiff qualified for during his employment with Rite Aid was under the Hero Pay program, which increased his pay by $2 per hour and that plaintiff was paid the overtime differential for his pay period ending March 21st, 2020, in the following pay period.

Additionally, defendants assert that plaintiff's subsequent paychecks through the remaining weeks of his employment all included Hero Pay overtime premium differentials for the overtime he worked during those periods. In other words, defendants argue that plaintiff "was not deprived of any Hero-Pay-based overtime pay." And that's in the defendant's memorandum at page six.

Now, in support of this argument, defendants submit a

declaration from Michael Alcovitz, the vice president of HR Business Partnership Organization Effectiveness of Rite Aid Corporation -- and that's the Alcovitz declaration -- as well as plaintiff's wage statements from March 22nd, 2020, to April 4th, 2020, pay period. I will refer to this wage statement as "the March 22nd to April 4th paystub." I treat defendants' argument as a factual challenge to plaintiff's standing. And there I'm citing *Marcial v. New Hudson*. And the citation is 2019 WL 1900336.

Now, in these circumstances, I "may consider evidence outside the pleadings, but should not consider any conclusory or hearsay statements including in the evidence." And I'm citing back to the same case. And just so we're clear, I'm citing back to *Marcial*. If the defendant's evidence is immaterial and does not contradict the plausible allegations of standing in the complaint, the plaintiff may rely on allegations in the pleadings. However, where a defendant provides evidence that controverts material factual allegations of standing in the complaint, the Court must make a factual determination as to the standing related allegations." Citing back to *Marcial*.

Plaintiff responds that defendants are simply making an argument as to the merits of plaintiff's claim and that, even assuming that plaintiff was correctly paid his overtime for the pay period after which he earned bonus pay, this

payment was not prompt, as required by the FLSA. Plaintiff also notes that defendants only proffered evidence of a single pay period that they purport represents correct payment and have not proper documentation regarding plaintiff's pay for his entire employment. As a threshold matter, plaintiff's assertion that defendants are making a merits-based argument is incorrect. Defendants' argument is that plaintiff cannot meet the injury prong of a standing analysis for a FLSA overtime wages claim because he was paid the overtime wages that he was owed. "This is a valid argument. If defendants did not violate the FLSA overtime wage provision, plaintiff could not have suffered the injury he alleges." And I'm citing *Marcial*. And that's 2019 WL 1900336 at 4. Based on the record before me, which includes the March 8th to March 21st paystub, the March 22nd to April 4th paystub and the Alcovitz declaration, it appears that the Hero Pay program, which resulted in a temporary pay increase of $2 for workers like plaintiff, was introduced in the middle of a pay period in which plaintiff alleges he was underpaid. For the 42.96 hours that plaintiff worked between March 15th and March 21st, 2020, plaintiff was paid an additional $2 per hour. Plaintiff's overtime for that pay period, 2.96 hours, however, was calculated using plaintiff's base pay of $17 per hour, not the $19 per hour from the Hero Pay program. The difference between what plaintiff was paid and what he should have been paid, considering the

Hero Pay overtime differential, is $2.96. Plaintiff was paid the remaining $2.96 in his subsequent paycheck. The parties do not seem to dispute that plaintiff was owed an additional $2.96 in overtime pay for the pay period ended March 21st, 2020. Plaintiff concedes that he was paid $2.96 in the following pay period, and his paystub shows that he was. Therefore, plaintiff was paid the overtime wages that he bases his FLSA claim on.

Plaintiff avers that the defendants have only proffered evidence of correct payment for one pay period, and that when plaintiff worked over 40 hours and was paid a bonus, his overtime rate was not properly calculated. Plaintiff, however, has not provided any additional paystubs reflecting that his overtime wages were incorrect in any subsequent pay periods. Additionally, plaintiff has not provided in connection with his opposition to this motion, a declaration stating otherwise. The March 22nd to April 4th paystub shows that plaintiff's overtime wages were properly calculated for that pay period. And Mr. Alcovitz declares that plaintiff was properly compensated at a rate of 1.5 of his combined regular and Hero Pay wages in his subsequent paychecks. Plaintiff offers no evidence to dispute this assertion.

Based on these facts, plaintiff was paid overtime wages on which he premises his FLSA overtime claim. The only remaining potential injury that plaintiff could base his FLSA

claim on is defendant's failure to promptly pay his overtime wages. This circuit has interpreted FLSA to "require wages to be paid in a timely fashion." And I'm citing *Rogers v. City of Troy*, 148 F.3d, 52 at 57.

Under the agency's non-binding interpretive bulletin, "the general rule is that overtime compensation earned in a particular work week must be paid on the regular payday for the period in which such work week ends, when the correct amount of overtime compensation cannot be determined until some time after the regular pay period; however, the requirements of the act will be satisfied if the employer pays the excess overtime compensation as soon after the regular pay period, as is applicable. Payment may not be delayed for a period longer than is reasonably necessary for the employer to compute and arrange for payment of the amount due, and in no event may payment be delayed beyond the next payday after such computation can be made." And I'm citing there 29CFR Section 778.106.

Typically, determining whether the prompt payment requirement is met involves a fact-based inquiry. And I'm citing, for example, *Merrill Lynch v. City of New York*, 291 F.Supp. 3d 547 at 552, as well as *Worley v. City of New York*, 2020 WL 730326 at 9. Although defendants provide reasons why plaintiff's payment was delayed, I find that at this stage, plaintiff has alleged a sufficient injury in fact the delayed

payment of overtime wages. I, therefore, deny defendant's motion to dismiss plaintiff's FLSA claim on that ground and find that I have subject matter jurisdiction over plaintiff's collective action claim. I note that plaintiff's FLSA claim survives only as it relates to defendant's failure to promptly pay plaintiff's overtime wages.

Now, with regard to the New York labor law claims, although the parties devote a substantial portion of their papers to the Class Action Fairness Act, CAFA, and its exceptions, I find I need not resolve this issue at this time because I will exercise supplemental jurisdiction over plaintiff's New York Labor Law claim. Hence, as I have stated, I find I have original jurisdiction over plaintiff's FLSA collective action claim. Under Section 1367(a), where a district court has original jurisdiction over a claim, the Court shall have supplemental jurisdiction over all other claims "if they derive from a common nucleus of operative fact." And I'm citing *Shahriar v. Smith & Wollensky*, 659 F.3d 234 at 245. Plaintiff argues that supplemental jurisdiction is proper here because his New York Labor Law claims arise out of the same nucleus of operative facts as his FLSA claim. Defendants contend "plaintiff's FLSA claim involved allegations that Rite Aid actually failed to properly factor in bonuses into plaintiff's and the putative nationwide collective regular rate for overtime wages calculations," while, "plaintiff's New

York Labor Law, Section 191 and 195 claims involve whether Rite Aid failed to timely pay its hourly New York employees weekly and derivatively provide them with accurate wage notices and wage statements." Therefore, according to defendants, the claims do not arise from the same nucleus of operative facts. And that's from defendant's reply on page seven.

Plaintiff brings the claims for overtime wages under both the FLSA and New York Labor Law that stem from plaintiff's allegation that defendants did not properly include bonus pay and overtime calculation. Defendants are correct that plaintiff's remaining New York labor law claim involve whether Rite Aid failed to timely pay New York hourly rate employees weekly and whether Rite Aid provided proper time of higher wage notices and wage statements. I find that exercising supplemental jurisdiction is proper here, as all of the claims arise out of Rite Aid's compensation policies and practices. And I'm citing *Shahriar*, 659 F.3d at 245 as well as *Catzin vs. Thank You & Good Luck*, 899 F.3d 77 at 80.

The Second Circuit has observed that "wage and hour cases are quotient, and federal courts are well experienced in presiding over them, even when they involve claims under New York Labor Law for which there is no FLSA equivalent, such as failure to provide wage notices." I'm citing *Catzin*, 899 F.3d at 86. Although defendants point to some differences in the actions, including that the FLSA collective is nationwide while

the New York Labor Law is brought on behalf of New York employees, I find that "those differences do not defeat the exercise of supplemental jurisdiction here in light of the Second Circuit's holding in *Shahriar* that a showing of common compensation policies among defendants is sufficient to meet the common nucleus standard." And there I'm citing *Santana v. Fishlegs*, 213 WL 5951438 at 7.

I now turn to Section 1376(c) categories under which I can decline supplemental jurisdiction. I note that even where the Section 1367(c) category applies, "a district court should not decline to exercise supplemental jurisdiction unless it also determines that doing so would not promote economy convenience, fairness and comity." I'm citing *Catzin* there, 899 F.3d at 85.

Defendants argue that because plaintiff lacks standing to assert his FLSA claim, I should decline exercising supplemental jurisdiction over his remaining New York Labor Law claim. Because I find that plaintiff has standing to bring his FLSA claim, this argument and the 1367(c) 4 -- excuse me. Because I find that plaintiff has standing to bring his FLSA claim, this argument and Section 1367(c)(4) are inapplicable. Additionally, defendants assert that I should not entertain supplemental jurisdiction because plaintiff's New York Labor Law claim raises unsettled issues of New York law. Whether there is a private right of action under New York Labor Law,

Section 191(a) for an employer's failure to pay workers on a weekly basis. Defendants proffer cases where New York state courts and federal courts have questioned whether such a right exists and have disagreed in some instances. These citations, however, demonstrates that courts within this circuit have been considering this issue for quite some time and that these sorts of claims are regularly before courts in this district. Likewise, plaintiff points to numerous cases in which courts within the Second Circuit have considered and resolved the issue based in part on a recent first department case. And that's from plaintiff's brief 13 to 14.

Okay. Defendants cite no case law to suggest that this is the kind of novel or complex issue of state law over which courts would typically decline supplemental jurisdiction. Indeed, although courts have reached different results when considering this issue, the issue does not seem novel or particularly complex. Defendants posit no reason why I cannot perform an analysis similar to those employed by other courts in this circuit to resolve the issue. In addition, "because this issue is a relatively minor aspect of the larger state claim and has been previously tackled by New York and federal courts, the Court will not decline jurisdiction on this ground." I'm citing *Whitehorn v. Wolfgang's Steakhouse*, 275 F.R.D. 193 at 198.

Even were it considered a novel or complex issue,

declining jurisdiction would not be appropriate given that judicial economy and convenience would not be served by making the parties litigate the claims in separate forums. I do not find any other circumstances that would warrant my declining supplemental jurisdiction over plaintiff's New York Labor Law claim. The Second Circuit has observed that "the 7th, 9th and District of Columbia Circuits all have.determined that supplemental jurisdiction is appropriate over state labor law class claims in an action where the court has federal question jurisdiction over FLSA claims in a collective action," and found supplemental jurisdiction proper in such a scenario. And I'm citing *Shahriar* there. 659 F.3d at 248. Accordingly, I will exercise supplemental jurisdiction over plaintiff's New York Labor Law claim. Defendant's motion to dismiss plaintiff's New York Labor Law claims is denied.

Now, with regard to personal jurisdiction. Finally, defendant's request I dismiss plaintiff's FLSA collective action claim to the extent it is brought on behalf of out-of-state employees who worked at out-of-state Rite Aid pharmacy locations because plaintiff has not plausibly alleged facts showing that I have personal jurisdiction over such claims. In *Bristol Meyers Squibb v. Superior Court of California*, 137 Supreme Court 773, the Supreme Courts considered the Fourteenth Amendment protections applicable to a state court exercising specific jurisdiction over mass work

claims of out-of-state residents against an out-of-state defendant. The Supreme Court explained that while "a court with general jurisdiction may hear any claim against that defendant, even if all incidents underlying the claim occurred in a different state. In order for the state court to exercise specific jurisdiction, the suit must arise out of or relate to the defendants' contact with the forum." And that's at 1780. The Supreme Court could find its decision to "the due process limits on the exercise of specific jurisdiction by a state, and thereby expressly left open the question of whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court." And I'm citing *Pettenato v. Beacon Health*, 425 F.Supp. 3d, 264 at 275.

Courts are divided as to the impact of *Bristol Meyers* on FLSA collective actions. Although some courts have held "*Bristol Meyers* does not apply to divest courts of personal jurisdiction over the claims of out-of-state plaintiffs in FLSA collective actions." Others have held that "*Bristol Meyers* applies to FLSA claims in that it divests courts of specific jurisdiction over the FLSA claims of out-of-state plaintiffs against out-of-state defendants." And the first quote was from *Swamy v. Title Source*, 2017 WL 5196780. And the second quote was *Chavira v. OS Restaurant*, 2019 WL 4769101 at 4.

Defendants urge me to follow the second line of cases, and the reasoning in *Pettenato*, which applied the

Bristol-Meyers rule to a FLSA collective action. Plaintiff urges me to decline to do so or find resolution on this issue -- or find resolution on this issue premature. To date, no Court of Appeals has addressed whether *Bristol Meyers* applies to FLSA collective actions. At this stage, I find the resolution of this issue premature since plaintiff has yet to even move for conditional certification of his action as a collective action under the FLSA. "In contrast to *Bristol Meyers*, there is no actual non-forum state plaintiffs or putative collective members to speak of yet in this case, making defendant's motion to dismiss premature." And I'm citing *Simon v. Ultimate Fitness*, 2019 WL 4382204 at 5, as well as *Bank v. CreditGuard*, 2019 WL 1316966 at 12. Defendant's phrasing, "to the extent the collective action seeks to bring claims on behalf of out-of-state Rite Aid employees" confirms that the issue defendants would like me to address is purely hypothetical at this time. The only plaintiff identified to date is Andrews, a New York resident, who worked at Rite Aid pharmacies within New York. "Since unnamed plaintiffs are merely potential collective members who may never actually be joined to this action, it would be premature for a Court to decide whether there is specific jurisdiction over the defendants with respect to their claims." And I'm citing there *Simon* 2019 WL 4382204 at 4. I will consider this issue if and when plaintiff moves for certification of his FLSA collective

action. Accordingly, defendant's motion to dismiss for lack of personal jurisdiction is denied without prejudice to raising it at a later stage.

Okay. Let me ask: Are there any questions with regard to my decision from the plaintiff?

MR. SCHAFFER: This is Brian Schaffer. Nothing from plaintiff. Thank you, your Honor.

THE COURT: All right. Any questions from the defendant, Mr. Freedberg?

MR. FREEDBERG: This is Eli Freedberg. No questions, your Honor.

THE COURT: All right. Thank you very much.

Is there anything that we need to deal with today from the plaintiff's perspective?

MR. SCHAFFER: Yes. Your Honor, I believe we should discuss an initial conference under Rule 26.

THE COURT: Okay. We will issue an order with regard to that, I believe. We'll issue an order with regard to the Rule 26 issue.

Mr. Freedberg, anything else -- I'm sorry.

Anything else from the plaintiff, Mr. Schaffer?

MR. SCHAFFER: No, your Honor. Thank you.

THE COURT: All right. Anything else for defendants, Mr. Freedberg?

MR. FREEDBERG: No further issues, your Honor. Thank

you.

THE COURT: Okay. All right. Thank you, counsel, for getting on the line and for your indulgence of me taking the time to read my decision.

We will stand adjourned. Thank you very much and everybody please stay safe.

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